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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BETTY V. PRITEL, Plaintiff and Respondent, v. ROMAN CATHOLIC BISHOP OF ORANGE, Defendant and Appellant.	G040485 (Super. Ct. No. 07CC04771) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Randell L. Wilkinson, Judge. Affirmed.

Sullivan & Ballog, Daniel R. Sullivan and Brian L. Williams for Defendant and Appellant.

Prenovost, Normandin, Bergh & Dawe, Thomas J. Prenovost, Jr., Tom R. Normandin and Kristin F. Godeke for Plaintiff and Respondent.

* * *

Plaintiff Betty V. Pritel sued defendant Roman Catholic Bishop of Orange seeking damages for emotional distress arising from the actions of a cemetery operated by defendant. The cemetery concealed its erroneous resale of burial plots previously acquired by plaintiff and her husband until after her husband died. A jury awarded plaintiff $140,000 in compensatory damages and $280,000 in punitive damages.

Defendant concedes the propriety of the compensatory damage award, but challenges the punitive damage award on two grounds. First, it contends the evidence fails to support a finding Lupe Ramirez, the cemetery's on-site supervisor, was a managing agent under Civil Code section 3294, subdivision (b) and, although her supervisor, Michael Wesner, is a managing agent for the Diocese, he did not ratify Ramirez's actions. Second, defendant contends the trial court erroneously allowed plaintiff's expert to opine the cemetery's initial concealment of the erroneous resale of grave sites was an "egregious outrage." Since the evidence supports a finding Wesner ratified Ramirez's actions and any error in admitting the expert's description of defendant's conduct was harmless, we affirm the judgment.

FACTS

Defendant operates several cemeteries including Good Shepherd Cemetery in Huntington Beach, California. In 1986, plaintiff and her husband purchased two adjacent burial plots at the cemetery. At the time, advance purchases of burial sites were manually recorded in an account card and in a plot book. The cemetery changed to a computerized system of recording burial site acquisitions in 2000.

Ramirez has been the cemetery's on-site supervisor since 2000. Wesner became defendant's Director of Cemeteries in 2001. During the cemetery's transition to a computerized system of recording burial site acquisitions, its employees discovered

several plots, including those purchased by the Pritels, had been sold to two different persons or families because earlier sales were not recorded in the plot book.

Ramirez immediately informed Wesner about the resale of burial sites. She also created a "special file" containing the names and cemetery records for the parties affected by the double-sold plots. However, claiming the cemetery then lacked additional comparable burial sites to offer in place of the resold plots, Ramirez did not contact the Pritels or other affected parties to inform them of the problem.

At trial, Ramirez initially denied she told Wesner about the special file. Plaintiff then introduced Ramirez's statement at her deposition that she told Wesner of her intent to create it. Later, Ramirez admitted she told Wesner about the special file "[b]ack in 2000 or 2001."

Wesner first testified he did not "recall" being informed of the special file, and later denied "know[ing] about the special file at all." However Wesner did admit that while he had the authority to direct Ramirez to contact the affected families, he left the resolution of the double-sold burial plots problem in her hands. He also described Ramirez's decision to delay contacting the affected parties as a "judgment call . . . best left for the cemeter[y]" and felt she made "a logical decision based on the lack of inventory . . . available at that time. I wouldn't want to contact the families unless we could resolve it."

Plaintiff's husband died in 2005. She then received a telephone call from the cemetery asking her come in and sign some papers. At that time she learned of the resale of their plots. The cemetery offered to provide them with new sites in another area of the cemetery. Plaintiff ultimately accepted two other plots after a cemetery employee represented that a nearby roadway was not going to be extended. Some time later, the cemetery did extend the road.

DISCUSSION

1. Sufficiency of the Evidence

Civil Code section 3294 authorizes an award of punitive damages "in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice . . . ." (Civ. Code, § 3294, subd. (a).) However, exemplary damages cannot be imposed on "a corporate employer" unless "an officer, director, or managing agent of the corporation," among other grounds, committed "or ratified the wrongful conduct for which the damages are awarded . . . ." (Civ. Code, § 3294, subd. (b).)

Citing its corporate status (Corp. Code, § 10002 ["corporation sole may be formed under this part by the bishop . . . or other presiding officer of any religious denomination . . . for the purpose of administering and managing the affairs, property, and temporalities thereof"]), defendant contends the evidence fails to support a finding a "managing agent" committed or ratified the wrongful conduct. It argues Ramirez is not a managing agent of the Diocese and, while Wesner concededly holds that status, he was unaware of Ramirez's plan to conceal the resale of burial plots and therefore could not have ratified her actions.

"The scope of a corporate employee's discretion and authority . . . is . . . a question of fact for decision on a case-by-case basis." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 567.) In reviewing the jury's punitive damage verdict, "we must inquire whether the record contains 'substantial evidence to support [its] determination by clear and convincing evidence . . . .' [Citation.]" (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891.) Nonetheless, "[a]s in other cases involving the issue of substantial evidence, we are bound to 'consider the evidence in the light *most favorable to the prevailing party*, giving him the benefit of *every*

reasonable inference, and *resolving conflicts* in support of the judgment.' [Citation.]" (*Ibid*.; see also *Kelly v. Haag* (2006) 145 Cal.App.4th 910, 916.)

Ramirez's status as a managing agent within the Diocese is doubtful. "[T]he term 'managing agent' . . . include[s] only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy." (*White v. Ultramar, Inc., supra*, 21 Cal.4th at pp. 566-567.) A managing agent must be more than a "mere supervisory employee" for the entity. (*Id.* at p. 573.) While Ramirez supervised the operation of the cemetery and its 16 employees, Wesner testified he had the authority to control her handling of the double-sold burial sites and could have overruled her approach had he chosen to do so.

However, a reviewing court may disregard particular theories and affirm the judgment on a theory which is supported by the evidence so that a cause may be disposed of by a single appeal. (*Crogan v. Metz* (1956) 47 Cal.2d 398, 403.) Here, sufficient evidence exists to support a finding Wesner not only knew about the double-sold plots, but also knowingly ratified Ramirez's plan to withhold disclosure of a resale from an affected party until there was a request to conduct a burial.

"For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 726.) "Corporate ratification . . . requires actual knowledge of the conduct and its outrageous nature" (*ibid.*), but it can arise where there is "[a]cquiescence or silence" in response to another's conduct. (*Common Wealth Ins. Systems, Inc. v. Kersten* (1974) 40 Cal.App.3d 1014, 1026.)

Ramirez notified Wesner about the resold burial plots shortly after discovering the problem. Although Ramirez initially denied telling Wesner of her plan to

create a special file for the affected parties, plaintiff introduced her inconsistent deposition testimony on this point. Later, Ramirez admitted she told Wesner about the special file in 2001. While Wesner denied Ramirez told him about the special file, we conclude the evidence presented at trial, viewed most favorably for plaintiff, supports a finding Wesner was informed of the special file's creation.

Defendant contends "there was absolutely no evidence . . . Wesner was informed by . . . Ramirez that she would not be contacting the families of the . . . double-sold graves immediately." We conclude the jury could reasonably find to the contrary.

Wesner acknowledged he had the authority to direct Ramirez to contact the affected parties and also admitted knowing about the cemetery's limited inventory of burial sites. From this evidence, the jury could logically infer Wesner, as the director of the Diocese's cemeteries, would have asked Ramirez how she intended to handle the problem of the double-sold plots. Wesner claimed he "le[ft] it in Mrs. Ramirez's hands" to handle the problem, but nonetheless expressed his belief her plan of action was a "logical" approach under the circumstances. Thus the evidence supports an inference Wesner, as defendant's managing agent, knowingly ratified Ramirez's decision to not contact the parties affected by the resold grave sites until the cemetery received a request to prepare the site for a burial, thereby supporting the jury's punitive damage award.

2. The Scope of the Expert Witness's Testimony

a. Background

Plaintiff called Danny Rohling, a licensed funeral director and embalmer, as an expert on cemetery management. Defendant interposed objections to Rohling expressing opinions that he thought defendant's employees "should have . . . contacted" the affected parties about the resale of the grave sites and that the actions of defendant's employees were "'absolutely outrageous.'" Defense counsel contended these were

issues for the jury to decide. "I want him to stick to his deposition testimony which was that there was no reason for the cemetery not to contact the people in the special file. But if he goes a step further and says . . . that . . . conduct was outrageous and despicable, . . . that[] . . . goes beyond any expert witness opinion." The trial court overruled defendant's objection.

Thereafter, Rohling opined he "believe[d] that . . . what happened in this case . . . is . . . an egregious outrage. [¶] . . . You don't sit on secrets . . . . [¶] When you have a problem with a cemetery, . . . you owe it to those loved ones to do the best you can to handle the situation appropriately. And in my opinion, this was not handled appropriately."

b. Analysis

Defendant contends "Rohling's opinion that [the cemetery's] conduct was an 'egregious outrage' [wa]s . . . inadmissible," because it "did not . . . assist the jury, but rather suggested how [it] should find."

Evidence Code section 805 declares expert opinion testimony is admissible even if "it embraces the ultimate issue to be decided . . .," but such testimony is permitted only where it "[r]elate[s] to a subject that is sufficiently beyond common experience that the opinion . . . would assist the trier of fact . . . ." (Evid. Code, § 801, subd. (a); see also *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 703.) "A trial court's determination that expert testimony is admissible is reviewed for an abuse of discretion [citations]" (*Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1168), and this "'"discretion is only abused where there is a clear showing [it] exceeded the bounds of reason, all of the circumstances being considered."' [Citation.]" (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 332.)

As the trial judge acknowledged, the admissibility of Rohling's expert opinions presented a "close call." It is doubtful Rohling's expert opinion was necessary

to assist the jury in determining whether the cemetery acted reasonably in concealing the resale of burial plots. "[E]xpert testimony is not required where a question is 'resolvable by common knowledge[,]'" such as when "'facts . . . may be ascertained by the ordinary use of the senses of a nonexpert.' [Citation.]" (*Easton v. Strassburger* (1984) 152 Cal.App.3d 90, 106.) The failure to immediately inform plaintiff and others about the double-sold plots was a straightforward failure to act, having nothing to do with the intricacies of operating a cemetery. (*Chaplis v. County of Monterey* (1979) 97 Cal.App.3d 249, 266)

Nonetheless, we conclude any error in allowing Rohling to express his "egregious outrage" opinion did not prejudice defendant. "'[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.] 'We have made clear that a "probability" in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.' [Citation.]" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800; see also *Saxena v. Goffney*, *supra*, 159 Cal.App.4th at p. 332 [error in evidentiary ruling "does not require reversal of the judgment unless the error resulted in a miscarriage of justice"].)

Rohling's opinion testimony was short, sandwiched between the testimony of Ramirez and Wesner on the one hand, and that of plaintiff and her neighbor on the other. Plaintiff's closing argument primarily focused on the testimony of Ramirez and Wesner and the resulting emotional harm suffered by the plaintiff. Of the 20 pages covered by it, only two paragraphs are devoted to expert testimony. Plaintiff's counsel even acknowledged Rohling's opinion about defendant's "policy of . . . keeping [the mistake in reselling cemetery plots] a secret until the grieving elderly widow shows up to bury her husband" was, at best, cumulative. "[Y]ou perhaps didn't even need that testimony to understand that yourselves." Thus, assuming the trial court abused its

discretion by admitting Rohling's expert's opinion, there is no reasonable probability the outcome of the trial would have been different had the court excluded this testimony.

DISPOSITION

The judgment is affirmed. Respondent shall recover her costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.